IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY SCOTT SOURBEER, : CIVIL ACTION

Petitioner,

v. : No. 13-3737

JOHN E. WETZEL, et al.,

Respondent.

ORDER

AND NOW, this 15th day of January, 2014, upon careful consideration of the petition for writ of habeas corpus, the Report and Recommendation of United States Magistrate Judge M. Faith Angell (Doc. No. 8), and after a thorough and independent review of the record, it is hereby **ORDERED** that:

- 1. The Report and Recommendation is **APPROVED** and **ADOPTED**, and Petitioner's Objections are **OVERRULED**.¹
- The Petition for Writ of Habeas Corpus is STAYED and held in ABEYANCE until the conclusion of Petitioner's state court proceedings.

The petition raises an argument based on Miller v. Alabama, 132 S. Ct. 2455 (2012), as well as another claim. Petitioner's unexhausted Miller claim is currently the subject of a PCRA petition in state court, the success of which depends in large part on whether Miller is made retroactive to convictions that were final on the date Miller was decided (Petitioner's conviction became final in 1980). Petitioner asks the Court to go ahead with his federal petition on the grounds that his state petition is hopeless following Commonwealth v. Cunningham, 2013 WL 5814388 (Pa. Oct. 30, 2013), in which the Pennsylvania Supreme Court held that Miller does not apply retroactively. However, the petitioner's counsel in Cunningham has indicated an intention to file a petition for certiorari with the United States Supreme Court. Because Cunningham may yet be reversed, it is appropriate to stay Petitioner's federal petition until his state review is complete. Should the U.S. Supreme Court deny certiorari, or affirm Cunningham, Petitioner's state petition will likely be dismissed in short order, at which time he may return to this Court to litigate his federal petition.

- 3. Petitioner shall return to federal court within thirty (30) days of the conclusion of his state court proceedings. If he fails to do so, this Order will be vacated and his Petition dismissed without prejudice.
- 4. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ Mitchell S. Goldberg

MITCHELL S. GOLDBERG, J.